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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

**In re:**

**PG&E CORPORATION**

**-and-**

**PACIFIC GAS AND ELECTRIC  
COMPANY,**

**Debtors.**

- ☐ Affects PG&E Corporation
- ☐ Affects Pacific Gas and Electric Company
- ☒ Affects both Debtors

*\*All papers shall be filed in the Lead Case,  
No. 19-30088 (DM)*

Bankruptcy Case  
No. 19-30088 (DM)

Chapter 11  
(Lead Case)  
(Jointly Administered)

**SUPPLEMENT TO OMNIBUS  
OBJECTION OF THE OFFICIAL  
COMMITTEE OF TORT CLAIMANTS  
(SUBSTANTIVE) TO NO LIABILITY  
CLAIMS FILED BY THE  
DEPARTMENT OF HOMELAND  
SECURITY / FEDERAL EMERGENCY  
MANAGEMENT AGENCY (CLAIM  
NOS. 59692, 59734 & 59783)**

Date: February 11, 2020  
Time: 10:00 a.m. (Pacific Time)  
Place: United States Bankruptcy Court  
Courtroom 17, 16th Floor  
San Francisco, CA 94102

Objection Deadline: January 28, 2020

The Official Committee of Tort Claimants (the “TCC”) in the above-captioned chapter 11 cases, hereby files this Supplement to the *Omnibus Objection of the Official Committee of Tort Claimants (Substantive) to No Liability Claims Filed by the Department of Homeland Security / Federal Emergency Management Agency (Claim Nos. 59783, 59734 & 59692)* (Dkt. No. 4943) (the “**Objection**”).<sup>1</sup> In addition to the arguments set forth in the Objection, the TCC asserts the following additional arguments and objections to the FEMA Claims.

### **SUPPLEMENTAL OBJECTIONS**

First, the Court should disallow the FEMA Claims under the equitable doctrine of marshaling. The Debtors’ chapter 11 plan (Dkt. No. 5101) (the “**Plan**”) currently channels the victims’ wildfire claims into the same trust as FEMA’s claims. This means that every dollar FEMA receives is one less dollar available to pay victims. The trust is the victims’ only source of recovery under the Plan. FEMA, however, has other sources of recovery available to it.

If the Court disallows the FEMA Claims, FEMA can recover its wildfire-related costs from State Agencies and Public Entities that received public assistance from FEMA. FEMA’s right to so seek reimbursement is set forth in Section 312 of the Stafford Act. *See* 42 U.S.C. § 5155(c). As case law shows, this is the statute FEMA typically uses to obtain recovery and offset its disaster-related costs. *See, e.g., State of Hawaii ex rel. Attorney General v. FEMA*, 294 F.3d 1152 (9th Cir. 2002). This is important here because certain State Agencies and Public Entities may be able to recover from the Debtors. Certain Public Entities have entered into a settlement with the Debtors and stand to recover \$1 billion in the Chapter 11 Cases. Upon information and belief, the Public Entities are liable to FEMA for some portion of this money.

Because FEMA can recover its losses from other sources, FEMA should be required to exhaust those sources before seeking to take money away from the victims. The doctrine of marshaling is an equitable remedy that may be invoked by a bankruptcy court. *St. Paul Fire & Marine Ins. Co. v. Fort Vancouver Plywood Co. (In re Brazier Forest Prods., Inc.)*, 921 F.2d 221, 223 (9th Cir. 1990) (“Marshaling is an equitable remedy and the decision to grant or deny marshaling of assets rests within the discretion of the trial court.”); *Victor Gruen Assocs., Inc. v.*

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<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Objection.

1 *Glass*, 338 F.2d 826, 829 (9th Cir. 1964) (bankruptcy courts, as courts of equity, are empowered to  
2 invoke and order marshaling).

3 The California Civil Code requires marshalling in two instances: Section 2899 applies to  
4 instances in which creditors have competing liens; whereas, Section 3433 applies to instances in  
5 which two competing creditors have competing claims to funds, irrespective of whether or not they  
6 have liens on the funds. Section 3433 of the California Civil Code provides as follows:

7 Where a creditor is entitled to resort to each of several funds for the  
8 satisfaction of his claim, and another person has an interest in, or is  
9 entitled as a creditor to resort to some, but not all of them, the latter  
10 may require the former to seek satisfaction from those funds to  
which the latter has no such claim, so far as it can be done without  
impairing the right of the former to complete satisfaction, and  
without doing injustice to third persons.

11 Cal. Civ. Code § 3433 (West 2019).

12 Assuming, *arguendo*, that FEMA can recover from the Debtors' estate, FEMA can also  
13 seek satisfaction from certain Public Entities and State Agencies—*i.e.*, several funds are available  
14 to FEMA. The fire victims' recovery, in contrast, is limited to the trust. Therefore, Section 3433  
15 of the California Civil Code which, unlike Section 2899 of the California Civil Code, makes no  
16 reference to competing liens, compels that FEMA's claims against the Debtors be disallowed or  
17 suspended until FEMA has exhausted all sources of recovery that are unavailable to the fire victims.  
18 *Compare* Cal. Civ. Code § 3433 *with* Cal. Civ. Code § 2899 (West 2019).<sup>2</sup>

19 Second, the TCC objects to the FEMA Claims on the grounds that FEMA failed to exercise  
20 an appropriate level of care in providing services, the costs of which form the basis for the FEMA  
21 Claims. Discovery on the FEMA Claims has begun. When discovery is completed, the TCC  
22 believes that it will be able to prove that the FEMA Claims should be disallowed and/or  
23 substantially reduced to reflect the damage it and its contractors caused. As a sample of the  
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26 <sup>2</sup> See also *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1089–90 (9th Cir. 2011)  
27 (“[W]here [the legislature] includes particular language in one section of a statute but omits it in  
28 another section of the same Act, it is generally presumed that [the legislature] acts intentionally and  
purposely in the disparate inclusion or exclusion.”) Case law involving competing lienholders or  
a lienholder and the doctrine of marshaling is inapposite here because neither FEMA nor the fire  
victims purport to hold liens on the funds in question. See, e.g., *Pac. Coast Joint Stock Land Bank  
of San Francisco v. Jones*, 14 Cal. 2d 8, 92 P.2d 390 (Cal. 1939).

1 testimony and evidence to come, the TCC offers the following letter from Sharon Zimmerman, a  
2 wildfire victim:

3 To The Honorable Judge Montali:

4 I'm writing to express my opposition to FEMA receiving a portion of the Wildfire  
5 Victims settlement with PG&E as part of the bankruptcy process. My husband and  
6 I lost two homes in Santa Rosa in the Tubbs Fire. We opted to use FEMA to do the  
7 debris removal for both our properties, in spite of hearing significant issues caused  
8 by FEMA experienced by past wildfire victims who used them for debris removal.  
We were assured by local and Federal government officials in community meetings  
that the FEMA debris removal process would be well supervised and that any  
damage caused by FEMA in the process of debris removal would be remediated.

9 Our experience with the FEMA contractors in the process of their performance of  
10 debris removal of our 3926 St Andrews Drive, Santa Rosa home confirmed all our  
11 worst fears of using FEMA for debris removal. The FEMA contractor (Ashbritt in  
12 our case) damaged our driveway, damaged site walls we didn't want removed,  
13 damaged retaining walls, removed a planter for no apparent reason, over excavated  
14 our lot and buried concrete debris from our house in the middle of the building site.  
FEMA/Ashbritt drove two massive excavators down our driveway with no attempt  
at mitigating damage to the driveway. The dump trucks continued to mar the  
surface of the driveway and due to the extreme weight of the trucks the driveway  
was cracked beyond repair in several places. The over excavation of the property  
required significant rock and aggregate to be brought onto the property to rebuild  
the foundation and added significantly to the cost of the project.

15 The damage to the driveway and site walls and over excavation were noticeable  
16 during the week in December 2017 that the FEMA contractor was performing  
17 debris removal. I called Congressman Mike Thompson's office to report the  
18 damage and his office arranged for an onsite inspection by the US Army Corps of  
19 Engineers. On December 13th 2017, while the FEMA contractor was still on site,  
20 I met with Tasha Alexander, QA Inspector for the US Army Corps of Engineers,  
21 and the manager of Ashbritt Construction to show them the damage that the FEMA  
22 contractor was causing to our property. They told me that remediating the damage  
23 was not part of their contract. Then in May of 2018 while digging the footings our  
builder discovered that the FEMA contractor had buried large sections of the  
concrete walls from our Insulated Concrete Form (ICF) house in the middle of our  
building envelope rather than removing them from the property as they were  
required to do as part of the debris removal process. I reported the damage by  
FEMA to Congressman Thompson's office, Supervisor Zane's office, Cal OES and  
FEMA and Army Corps of Engineers. I was later provided a letter signed by Cal  
OES and FEMA stating I could use the debris removal funds in our insurance policy  
to remediate the damage caused by the FEMA contractor.

24 The estimated additional costs to remediate the damage caused by FEMA to our  
25 property totaled over \$197,000 and the breakdown is:

- 26 • \$136,800 to repair the driveway
- 27 • \$26,000 for rock and aggregate plus labor and equipment for over  
28 excavation
- \$19,000 to repair damage to site walls and retaining walls
- \$15,288 to remove the debris buried by the FEMA contractor

1 An apparent cause of some of the issues with the FEMA debris removal process  
2 from the Wine Country 2017 wild fires was the change in the FEMA contract  
3 during the debris removal process. Initially contractors were paid by the ton for the  
4 amount of the debris that they removed. This clearly incentivized the contractors  
5 to remove the maximum amount of debris which resulted in significant over  
6 excavation. When FEMA realized this was causing not only significant over  
7 excavation but also excessively high costs, they renegotiated the contract with the  
8 FEMA contractors to a per lot rate for debris removal. This amount per lot  
exceeded \$250,000, which in most cases was far in excess of what private debris  
removal estimates were for the same work. In the case of the debris removal for  
3926 St Andrews Drive the FEMA contract was being renegotiated while the  
contractor was working on debris removal of our property. This resulted in the  
worst of both situations for our property; the over excavation of the property but  
also burial of some concrete walls from our house when the contractor realized that  
the cost to remove our ICF walls exceeded this negotiated flat rate.

9 FEMA's management of the debris removal process in the Wine Country 2017 wild  
10 fires was clearly flawed and lead to cost overruns for FEMA. However, it is not  
11 the fault nor should [it] be the responsibility of Wild Fire victims to reimburse  
12 FEMA for their own negligence in managing their contracts with their contractors.  
To allocate \$4.5 billion of the long negotiated settlement with PG&E for wild fire  
victims to FEMA will serve to victimize them yet again. The Wild Fire victims  
need and deserve the settlement funds from PG&E to rebuild their homes and lives.

13 As a matter of equity, FEMA's unclean hands preclude its recovery from the victims here.

14 Third, the TCC also raises any all statute of limitation defenses available under applicable  
15 law. FEMA waited over three years after the Butte Fire began to assert its claims arising therefrom  
16 against the Debtors, which makes them untimely under 28 U.S.C. § 2415(b).

### 17 **RESERVATION OF RIGHTS**

18 The TCC reserves the right to raise further and other objections to the FEMA Claims,  
19 including, but not limited to, objections discovered as a result of ongoing discovery against FEMA  
20 and Cal OES. The TCC submits that the FEMA Claims can be disallowed on legal grounds because  
21 FEMA has failed to allege facts that, if proven true, would support a claim under Section 317 of  
22 the Stanford Act. *See* 42 U.S.C. § 5160(a). Should FEMA survive the Objection, the TCC intends  
23 to submit further evidence in support of the objections set forth herein.

24 WHEREFORE, the TCC respectfully requests entry of an order disallowing and expunging  
25 the FEMA Claims and granting such other and further relief as this Court deems just and proper.  
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Dated: January 9, 2020

BAKER & HOSTETLER LLP

By: /s/ Robert A. Julian  
Robert A. Julian

*Counsel to the Official Committee of Tort  
Claimants*